No. 47696-7-II

COURT OF APPEALS
FOR THE STATE OF WASHINGTON
DIVISION II

KITSAP COUNTY CONSOLIDATED HOUSING AUTHORITY
d/b/a HOUSING KITSAP

Respondent

vs.

KIMBRA HENRY-LEVINGSTON

Appellant

REPLY BRIEF OF APPELLANT

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I. INTRODUCTION

The trial court erred by allowing Housing Kitsap to maintain this unlawful detainer action against Kimbra Henry-Levingston ("Kimbra") without the prerequisite of a proper unlawful detainer notice. A landlord must strictly comply with the statutory requirements to maintain an unlawful detainer action. For a breach of a lease covenant, the landlord must serve a notice specifying the breach and providing a 10-day opportunity to cure under RCW 59.12.030(4). The tenant is in unlawful detainer status by failing to correct the breach within the 10 day period. Housing Kitsap unlawfully bypassed this process by asserting that it terminated Kimbra's lease and tenancy through a federal notice and internal administrative grievance process, that her terminated lease thus expired, and that no unlawful detainer notice was required under RCW 59.12.030(1).

Kimbra's public housing lease is not a fixed-term lease with a specific expiration date after which the occupant has no right to remain. The lease has an initial term of twelve months and renews automatically for the same period every twelve months. Because the lease automatically renews from year to year, her tenancy is periodic tenancy and not a fixed-term tenancy. The requirement that public housing authorities provide public housing tenants with twelve-month leases that automatically renew and do not expire by their terms is mandated by federal law. 42 U.S.C. §

1437d(l)(1); 24 C.F.R. § 966.4(a)(2)(i).

Because Kimbra's lease had no specific expiration date that could be ascertained at the inception of the tenancy, she did not hold over after the expiration of the term for which her apartment was let, and her tenancy did not terminate without notice under RCW 59.12.030(1). The trial court erred in allowing this unlawful detainer action to proceed under RCW 59.12.030(1) without a proper unlawful detainer notice under RCW 59.12.030(4) in violation of Supreme Court precedent in *Housing Authority of Everett v. Terry*, 114 Wn.2d 558, 789 P.2d 489 (1990); *See also, FPA Crescent Associates, LLC v. Jamie Pendleton*, 190 Wn. App. 666, 360 P.3d 934 (2015); *Housing Authority of Seattle v. Silva*, 94 Wn. App. 731, 972 P.2d 952 (1999); *Sullivan v. Purvis*, 90 Wn. App. 456, 966 P.2d 912 (1998).

II. The Supreme Court Decision in *Terry* Not Only Applies to This Case, But is Controlling Authority

Housing Kitsap argues that the Supreme Court case of *Housing Authority v. Terry* does not apply to this case. *Brief of Respondent*, p. 16. Housing Kitsap contends that *Terry* does not apply because (1) it did not explicitly argue federal preemption and (2) it brought the unlawful detainer action under RCW 59.12.030(1) and not RCW 59.12.030(4). Both parts of this argument are mistaken; *Terry i*s directly on point and is

controlling authority in this case.

A. The Argument That *Terry* Does Not Apply Because Housing Kitsap Did Not Claim Federal Preemption Lacks Merit.

Housing Kitsap mistakenly contends that *Housing Authority of Everett v. Terry* is not applicable to this case because, unlike the Housing Authority of Everett, it did not argue explicitly that federal law preempts state law notice requirements in unlawful detainer actions against public housing tenants, as was firmly rejected by the Supreme Court in *Terry*. *Brief of Respondent*, p. 16. Despite this contention, Housing Kitsap, citing *Terry*, acknowledges that public housing authorities must comply with both federal law and state law in terminating public housing tenancies and obtaining restitution of the premises. *Brief of Respondent*, p. 9, 16. In *Terry,* the trial court erroneously ruled that federal law preempts the Washington statutory unlawful detainer notice requirements. 114 Wn.2d at 560. The Everett Housing Authority argued that the 10-day opportunity to correct a breach of lease covenant provided by RCW 59.12.030(4) is preempted by federal law reflecting a congressional intent to achieve prompt eviction of tenants who like Mr. Terry pose a serious threat to other tenants. *Id.* at 565. The holding of the Supreme Court in *Terry* was succinct: "We hold that there is no federal preemption of the statutory notice provisions and that there is no jurisdiction without statutory notice."

Id.

Housing Kitsap maintains that it can avoid the application of *Terry* by the simple expedient of not making any explicit argument that federal law preempts state law notice requirements as was firmly rejected by the Supreme Court in *Terry*. However, Housing Kitsap cannot evade the crux of the holding in *Terry*, that "there is no jurisdiction without statutory notice" and "[i]n an action for unlawful detainer alleging breach of covenant, a notice which does not give the tenant the alternative of performing the covenant or surrendering the premises does not comply with the provisions of the statute." *Id.* at 564, citing *Woodward v. Blanchett,* 36 Wn.2d 27, 31, 216 P.2d 228 (1950).

It is undisputed that Housing Kitsap failed to provide a statutory unlawful detainer notice to Kimbra before commencing this unlawful detainer action. The only notice Housing Kitsap provided to Kimbra was the November 26, 2014 notice. Ex. 4, CP 320-25. It provides no opportunity to cure the breach of a lease covenant it alleges. It does not comply with RCW 59.12.030(4) or with any other subsection of RCW 59.12.030. Housing Kitsap "does not assert that the notice to Kimbra terminated the tenancy under any provision of RCW 59.12.030." *Brief of Respondent*, p. 10.

Housing Kitsap attempts to bolster its argument that *Terry* is not

applicable (because it does not argue federal preemption) by asserting that "the main issue" in *Terry* was whether federal housing law preempts state law. *Brief of Respondent*, p. 16. The federal preemption issue was the second of the two issues of "broad public import" identified by Division One when it certified the case to the Supreme Court for "prompt and ultimate determination." There were four issues addressed by the Supreme Court in *Terry* after it accepted certification from Division One. *Terry*, 114 Wn.2d at 562. First, whether a trial court has subject matter jurisdiction over an unlawful detainer action when the plaintiff has not complied with the notice provisions of RCW 59.12.030. *Id.* Second, if not, then whether federal law preempts the notice requirements of RCW 59.12.030 in housing authority leaseholds. *Id.* The third issue, a question involving a defense of failure to reasonably accommodate Mr. Terry's handicap, and fourth involving attorney's fees are not relevant here. *Id.*

The Supreme Court could only reach the federal preemption issue after first holding that a trial court has no jurisdiction to proceed in an unlawful detainer action when the plaintiff has not complied with the statutory notice provisions of RCW 59.12.030. *Id.* at 564-65. Having answered the first issue, the Supreme Court held that there is no federal preemption of the notice requirements of RCW 59.12.030. *Id.* at 569. There was no federal preemption because it is possible to reconcile the

requirements of federal law with the requirements of a state law unlawful detainer notice by drafting a notice that satisfies the requirements of both. *Id.* at 568. The Supreme Court suggests that the Housing Authority of Everett could have reconciled the federal law and state law requirements "simply by including within the federal notice the 10-day opportunity to correct required by RCW59.12.030(4). *Id.*

There was also no federal preemption of the notice requirements of RCW 59.12.030 because an alternate cause of action is available, i.e. an action in ejectment. *Id.* at 569. The Supreme Court states that: "Compliance with the federal notice requirements of 42 U.S.C. § 1437d(l)(3)(A) would permit a landlord to utilize the Washington cause of action in ejectment under RCW 7.28, which does not have a 10-day opportunity-to-correct requirement." *Id.* at 566.

1. The Lease Termination and Eviction Procedures Used by Housing Kitsap Are Nearly Identical to Those Used by the Housing Authority of Everett.

Like the Housing Authority of Everett, Housing Kitsap elected to bring this action to regain possession as an unlawful detainer action rather than as an action in ejectment. Like the Housing Authority of Everett, Housing Kitsap issued a federal termination of tenancy notice but did not serve a proper unlawful detainer notice that complied with any provision of RCW 59.12.030. Like the Housing Authority of Everett, Housing

Kitsap issued a notice to terminate tenancy that alleged breaches of covenants of the lease that amounted to "serious or repeated violations of the lease." Like the Housing Authority of Everett, Housing Kitsap issued a notice that did not provide the 10-day opportunity to cure required by state law if the landlord elects to use the favorable expedited procedures of an unlawful detainer action.

The Supreme Court in *Terry* described the Everett Housing Authority as seeking "a 'best of both worlds' mixture of state and federal procedures. It first sought to substitute a state trial for a federal grievance hearing. This is permissible. It then sought to substitute a federal notice for a state statutory notice. This is not permissible." *Id.* at 563. It was permissible for the Housing Authority of Everett to bypass an internal administrative grievance hearing for Mr. Terry and proceed directly to a state court unlawful detainer action because his termination involved allegations of criminal activity that threatened health or safety of neighboring tenants. *See*, 42 U.S.C. § 1437d(k); 24 CFR § 966.51(a)(2)(i). Unlike in *Terry*, it was not permissible for Housing Kitsap to bypass its grievance procure and proceed directly to a state court unlawful detainer action because the allegations of lease violations against Kimbra did not involve violent or drug-related criminal activity or threats to health or safety. Ex 4; 42 U.S.C. § 1437d(k); 24 CFR § 966.51(a)(2)(i). Housing

Kitsap did provide Kimbra with a federally-mandated grievance procedure before commencing the unlawful detainer action and the adequacy of that procedure as a mandatory condition precedent to a state court eviction was not challenged below and is not at issue here.

However, precisely as the Housing Authority of Everett sought to do in *Terry,* Housing Kitsap substituted a federal notice for a state law unlawful detainer notice in terminating Kimbra's tenancy. This is not permissible. It is undisputed that Housing Kitsap provided no statutory unlawful detainer notice with an opportunity to correct the alleged lease violations before commencing this unlawful detainer action. Housing Kitsap concedes that its November 26, 2014 notice did not terminate the tenancy under any provision of RCW 59.12.030. *Brief of Respondent*, p. 10.

2. Without Explicitly Arguing Federal Preemption, Housing Kitsap Argues That Compliance With Federal Lease Termination Requirements Negates The Need to Comply With State Law Lease Termination Requirements Under RCW 59.12.030(4).

Housing Kitsap does not explicitly argue that federal law preempts state law notice requirements. Instead, Housing Kitsap's theory is that it terminated Kimbra's lease and tenancy by issuing a federal notice of tenancy termination and by providing a federally-mandated internal

administrative grievance hearing that upheld the termination decision. It argues that that this procedure complied with federal law and the lease. Because the lease and tenancy were terminated under federal law by Housing Kitsap's notice and grievance hearing process, the lease could not automatically renew. If the lease could not renew, the argument goes, then it "expired." Once the lease "expired" by means of this federal law termination process, Housing Kitsap could circumvent the state law requirement of notice of breach of a lease covenant with a 10-day opportunity to correct the breach under RCW 59.12.030(4), and instead treat Kimbra as a holdover tenant who can be evicted under RCW 59.12.030(1) without notice.

Housing Kitsap's argument is tantamount to arguing federal preemption without acknowledging that it is doing so. A Housing Authority's compliance with federal notice and grievance procedures does not negate the state law requirement of providing a statutory unlawful detainer notice before proceeding with an unlawful detainer action. *Terry. See also, Housing Authority of Seattle v. Silva*, 94 Wn.App. 731, 972 P.2d 952 (1999); *Sullivan v. Purvis*, 90 Wn. App. 456, 966 P.2d 912 (1998). As explained by the Washington Supreme Court in order for a landlord to obtain relief under the unlawful detainer statute for breach of lease covenant three things must first happen:

> There must exist a breach or breaches of the covenants of the lease; the landlord must notify the tenant of the existence of such breach or breaches, and give him ten days to correct them; the tenant must fail or neglect to correct such breach or breaches. The tenant is then guilty of unlawful detainer, and the landlord is entitled to possession.

Wilson v. Daniels, 31 Wash.2d 633, 643, 198 P.2d 496 (1949).

3. Termination of a Public Housing Lease and Tenancy Requires Either a Single Notice that Complies with Both State and Federal Law or Two Separate Notices.

In *Terry*, the Supreme Court made clear that the federal notice provisions apply to the federal procedures affording tenants due process before termination of their leases and not to state court proceedings based on those terminations. 114 Wn.2d at 567. "Congress may have intended to create its own notice provisions for termination of leases, but, in leaving eviction proceedings to the states for enforcement, Congress necessarily relied upon existing state substantive law." *Id.* at 566. "Nothing in the federal statute suggests that a housing authority is not required to follow state procedural requirements while taking advantage of a state hearing." *Id.* at 567. The Housing Authority of Everett cited *Staten v. Housing Authority of Pittsburgh*, 469 F.Supp. 1013 (W.D.Pa. 1979) for the proposition that a federal notice and a state notice cannot be combined into a single notice. *Id.* at 568, fn. 22. The Supreme Court in *Terry* rejected this requirement for two separate notices, stating that *Staten* case more

appropriately stands for the propositions that regardless of any parallel or duplicate federal notice requirements, state notice (Pennsylvania) must be given as prescribed by the relevant statute. *Id.* HUD rules now provide that a notice to vacate which is required by State or local law may be combined with, or run concurrently with, a notice of lease termination. 24 C.F.R. § 966.4(l)(3)(iii). Housing Authorities must comply with both federal and state law notice requirements in terminating the lease of a public housing tenant. In Washington, it possible to combine the notice requirements of federal law and state law into one notice so long it fully complies with both. Public housing tenants must be afforded the full protections of federal law and state law. *Terry*. *See also, Kennedy v. Andover Place Apartments*, 203 S.W.3d 495 (2006).

B. Housing Kitsap Cannot Maintain This Unlawful Detainer Action Under RCW 59.12.030(1)

RCW 59.12.030(1) applies only to tenants who continue in possession of real property "after the expiration of the term for which it is let." "When real property is leased for a specified term . . . , the tenancy shall be terminated without notice at the expiration of the specified term." RCW 59.12.030(1). It does not apply when a tenant stays in possession after the landlord unilaterally terminates the lease, as happened here. *FPA Crescent Associates, LLC v. Jamie Pendleton*, 190 Wn. App. 666, 360

P.3d 934 (2015).

1. The Term of Kimbra's Tenancy Was Not for a Fixed-Term That Expired on a Specific Date.

The lease between the parties creates a periodic tenancy that renews automatically every twelve months. *See*, 17 Wash.Prac. § 6.13-14, § 6.72. Contrary to Housing Kitsap's assertion, it is not a fixed term tenancy that expires automatically by its terms. See, 17 Wash.Prac. § 6.7, § 6.71. Public housing leases are required by Federal law to have term of twelve months that automatically renews for all purposes. 42 U.S.C. § 1437d(l)(1) ("Each public housing agency ***shall*** utilize leases which—(1) have a term of 12 months and **shall be automatically renewed for *all* purposes** . . .")(Emphasis added.); 24 C.F.R. § 966.4(a)(2)(i) ("The lease shall have a twelve month term. . . . [and] the ***lease term must be automatically renewed*** for the same period.")(Emphasis added.) The only exception to automatic renewal, not relevant here, is failure to comply with community service requirements. 42 U.S.C. § 1437d(l)(1); 24 C.F.R. § 966.4(a)(2)(i).

This twelve-month lease term that automatically renews and cannot be terminated except for "good cause" required by federal law for public housing tenants is analogous to the twelve-month lease term that automatically renews and cannot be terminated without cause required by

state law for mobile home park tenants. If a tenancy is governed by the Manufactured/Mobile Home Landlord Tenant Act, RCW 59.20, the landlord must offer a written one year rental agreement. RCW 59.20.090(1). The tenant can waive the right to a one-year rental agreement but the waiver must be in writing. RCW 59.20.050(1). Annually, at any anniversary date of the tenancy the tenant may require that the landlord provide a written rental agreement for a term of one year. RCW 59.20.050(1). If a landlord does not provide a one year rental agreement, and the tenant does not sign a written waiver of the right to one year lease, then the tenancy is deemed to be for one year from the date of occupancy of the mobile home lot. RCW 59.20.050(1). A rental agreement of whatever duration renews automatically for the term of the original rental agreement. RCW 59.20.090(1). The Manufactured/Mobile Home Landlord Tenant Act abolished "no cause" eviction. The exclusive permissible reasons for terminating any mobile home park tenancy or occupancy governed by RCW 59.20 are set forth in RCW 59.20.080.

At the inception of Kimbra's tenancy, the expiration date of the term for which the real property was let to her was unknown. This is because the term was to continue indefinitely, renewing automatically every twelve months. There was no fixed term with a specific expiration date. As with any public housing tenancy, it is possible that at any time

the lease could be *terminated* for "good cause" and the tenant evicted through a state court eviction process. Because the term is not fixed, has no specific expiration date and renews automatically every twelve months, the term of the tenancy might end up being for a month or for a lifetime.

Even under Housing Kitsap's theory of the case, the term for which Kimbra's public housing apartment was let did not expire by itself without the lease first having been terminated by Housing Kitsap's federal notice of termination of tenancy and internal administrative grievance hearing decision upholding the termination. Significantly, Housing Kitsap does not claim that it can simply refuse to renew a public housing tenant's lease without cause at the end of any automatically-renewing twelve-month period, proceed to an unlawful detainer action under RCW 59.12.030(1) without notice, and assert that the tenant is guilty of unlawful detainer for holding over after the expiration of the term for the property was let. Housing Kitsap acknowledges that it must allege and prove "good cause" and that it must provide adequate notice and an opportunity to be heard in an internal administrative grievance hearing, as required by federal law and the terms of the lease.

Housing Kitsap has the sequence of events necessary for a tenant to reach the status of unlawful detainer under RCW 59.12.030(1) backwards. Under RCW 59.12.030(1), "When real property is leased for

a specified term or period . . . the tenancy shall be terminated without notice at the expiration of the specified term or period." Under RCW 59.12.030(1), it is the expiration of the specified term for which real property is leased that causes the termination of the tenancy without notice. Under Housing Kitsap's theory, it is the termination of the tenancy through a federal notice and grievance process that causes the lease not to renew, and this non-renewal of the lease is tantamount to the expiration of the specified term for which the property was let.

2. Housing Authorities Cannot Terminate a Public Housing Lease at the Expiration of Fixed Term Without Good Cause; A Public Housing Lease Cannot Simply Expire

Following the landmark U.S. Supreme Court decision, *Goldberg v. Kelly*, 397 U.S. 254, 90 S.Ct. 1011(1970), courts began applying the *Goldberg* principles to federally-subsidized housing programs. *See* e.g. *Escalera v. New York City Housing Authority*, 425 F.2d 853 (2d Cir.1970), cert. denied, 400 U.S. 853, 91 S.Ct. 54 (1970); *Caulder v. Durham Housing Authority*, 433 F.2d 988 (4th Cir. 1970), cert. denied, 401 U.S. 1003, 91 S.Ct. 1228, (1971). In addition to requiring adequate notice and opportunity to be heard, these cases determined that "good cause" was required to terminate a federal subsidy or evict a federally-subsidized tenant. Related to the "good cause" protections is the requirement that

federally-subsidized leases cannot expire at the end of a lease term without cause. In *McQueen v. Drukor,* 317 F.Supp. 1122 (1970), for example, the court stated that:

> If the government must give good cause for terminating a tenancy then, in effect, there are no longer monthly or annual leases. A tenant may remain, if not forever, at least until he misbehaves, or he becomes rich, or the government adopts general rules under which he no longer qualifies. . . . . The provisions of the lease which purport to give the landlord the power to terminate without cause at the expiration of a fixed term are invalid.

317 F.Supp. at 1130-31. Similarly, the court in *Joy v. Daniels,* 479 F.2d 1236 (4th Cir. 1973), found that tenants in HUD Multifamily housing have a constitutionally-protected property interest in the continuation of tenancy "until there is cause to evict other than the mere expiration of the lease. We therefore hold that the lease provision purporting to give the landlord power to terminate without cause at the expiration of a fixed term is invalid." 479 F.2d at 1241. A landlord may not terminate HUD-subsidized housing solely because the term of the lease has expired. *See, Kennedy v. Andover Place Apartments*, 203 S.W.3d 495 (2006) and cases cited therein.

These protections for federally subsidized tenants established through due process litigation have since been codified in statutes, regulations, and HUD Handbooks and are usually incorporated into the

tenant's lease. These basic "due process" and "good cause" protections have long been incorporated into the HUD regulations for public housing tenants at 24 C.F.R. § 966.

3. Housing Kitsap Cannot Bypass the Notice and Opportunity to Cure Provision of RCW 59.12.030(4) By Asserting Compliance With Federal Law and the Lease.

Housing Kitsap asserts that RCW 59.12.030(1) (holdover tenant who remains after the expiration of a fixed-term lease guilty of unlawful detainer action without notice) applies to this case and that the trial court properly allowed Housing Kitsap to avail itself of the court's jurisdiction and maintain this unlawful detainer action. [cite] Housing Kitsap maintains that RCW 59.12.030(4) (authorizing unlawful detainer against tenant who breaches a lease covenant and does not correct the breach within ten days after notice providing a 10-day opportunity to cure) does not apply because it chose not to issue such a notice and because it issued a federal notice of termination of tenancy and provided federally-mandated grievance process that upheld the termination. *Brief of Respondent, p.15-16.*

Housing Kitsap argues that it terminated Kimbra's lease and tenancy by issuing a notice to terminate tenancy that complied with federal law as incorporated into the public housing lease and by providing

a federally-mandated internal administrative grievance hearing that upheld the termination. *Brief of Responden,t p.15-16.* Having terminated Kimbra's lease and tenancy in this manner under Federal law, Housing Kitsap contends that her lease and tenancy could not automatically renew. *Brief of Respondent, p.15-16.* Housing Kitsap further claims that if the lease cannot renew because it was terminated, then the term for which the property was let must have expired. *Brief of Respondent, p.15-16.* As a result of this ostensible non-renewal and expiration of the lease, Housing Kitsap claims it can evade the usual state law requirement of providing a notice to comply with the lease or vacate under RCW 59.12.030(4) and instead proceed in an unlawful detainer action under the holdover provision of RCW 59.12.030(1) without the jurisdictional condition precedent of an unlawful detainer notice. *Brief of Respondent, p.15-16.*

In a recent case involving a commercial tenancy, *FPA Crescent Associates, LLC v. Jamie Pendleton,* Division III of the Court of Appeals rejected essentially the same argument Housing Kitsap makes here. 190 Wn. App. 666, 360 P.3d 934 (2015). The issue in the *Pendleton* case was "whether a landlord may bypass the notice and right to cure provision of RCW 59.12.030(3) by declaring a tenant in default for nonpayment of rent, then terminating the tenancy, and then arguing that the tenant is a holdover tenant detaining under RCW 59.12.030(1). We answer 'no' to

the issue presented." *Id.* at 668.

The commercial lease in *Pendleton* was for a 90-month term and included a provision that upon any default, the landlord could terminate the lease, take possession of the premises and expel the tenant. *Id.* FPA served a notice of lease termination alleging failure to pay rent and demanding immediate surrender of the premises. *Id.* The notice provided no opportunity to cure the default within three days as required by RCW 59.12.030(3). *Id.* The trial court ruled that the tenant defaulted on the lease by failing to pay additional rent, that FPA terminated the lease in accordance with its terms and was not obligated to accept tender, and that the unlawful detainer action was properly brought under RCW 59.12.030(1) without a notice with an opportunity to cure under RCW 59.12.030(3). *Id.*

The Court of Appeals squarely rejected FPA's argument that RCW 59.12.030(1) provides a basis to find Pendleton in unlawful detainer status. *Id.* at 676.

> Because *Terry* requires us to construe ambiguities in the unlawful detainer statute strictly in favor of tenants, we distinguish 'expiration of the term for which it is let' from a unilateral termination, such as what occurred here. We thus hold that a landlord must comply with RCW 59.12.030(3) notice and opportunity to cure procedures prior to bringing an unlawful detainer action against a tenant whose lease it unilaterally terminated for non-payment of rent.

Id. The Court of Appeals went further, adding that "even if we were not charged with construing ambiguities in the unlawful detainer act strictly in favor of tenants, we would hold that this construction is required by the plain language of the statute." *Id.* RCW 59.12.030(1) is applicable only after expiration of the fixed term as specified in the lease. *Id.* at 677. The Court of Appeals concluded that RCW 59.12.030(3) was the applicable subsection for FPA to seek relief against Pendleton in an unlawful detainer action. *Id.* This is because "[i]n an action for unlawful detainer alleging breach of a covenant, a notice which does not give the tenant the alternative of performing the covenant or surrendering the promises does not comply with the provisions of the statute." *Id.,* quoting *Terry.*

A lease provision containing a right to terminate without requiring notice and an opportunity to cure does not provide a basis for circumventing the statutory notice requirements if the landlord seeks to use the unlawful detainer statute to recover property. *Id.* at 940, citing *Jeffries v. Spencer*, 86 Wash. 333, 149 P. 651 (1915). Holding that FPA could not obtain relief under the unlawful detainer statute because it did not give proper notice under RCW 59.12.030(3), the Court of Appeals reversed the trial court's grant of summary judgment, held that Pendleton was not guilty of unlawful detainer and dismissed the action. *Id.*

4. Housing Kitsap's Attempt to Distinguish *FPA Crescent Associates, LLC v. Jamie Pendleton* Is Mistaken

Housing Kitsap attempts to distinguish *FPA Crescent Associates, LLC v. Jamie Pendleton* in two ways. First, it contends that its termination of Kimbra's public housing lease and tenancy was not *unilateral* because federal law required it to provide an internal administrative grievance process before it could proceed with an unlawful detainer action in state court, and it did provide a grievance process. Second, it contends that unlike the 90-month lease term in *FPA v. Jamie Pendleton*, Kimbra's lease expressly expired on December 31, 2014. Both of these contentions are mistaken, and *FPA Crescent Associates, LLC v. Jamie Pendleton* cannot be distinguished in any meaningful way.

a. Housing Kitsap's Termination of Kimbra's Lease and Tenancy was Unilateral

Housing Kitsap's termination of Kimbra's public housing lease and tenancy was unilateral. *Merriam-Webster's Dictionary* defines *unilateral* as "done or undertaken by one person or party; one-sided." Unilateral is not mutual, bilateral or multilateral. Housing Kitsap is the only party that acted to terminate the lease and tenancy. It alone decided to terminate Kimbra's lease and tenancy, and it alone issued the notice of termination. There was no mutual termination of tenancy between

Housing Kitsap and Kimbra. Attempting to preserve her subsidized housing for herself and her children, Kimbra opposed the termination at every step. Because the termination of Kimbra's lease and tenancy is entirely one-sided, it is a unilateral termination.

The fact that Housing Kitsap was required by 42 U.S.C. § 1437d(k), 24 CFR § 966, U.S. Const. Amend. XIV § 1, and the lease to provide Kimbra with the opportunity for an internal administrative grievance hearing before proceeding with a state court unlawful detainer action does not change the unilateral nature of its termination of Kimbra's tenancy. When the hearing officer, appointed by Housing Kitsap, upheld Housing Kitsap's decision to terminate Kimbra's public housing lease and tenancy (Ex. 3, CP 316-19), Housing Kitsap's unilateral termination of Kimbra's lease and tenancy was not transformed into something other than a unilateral termination.

Nor did the orders of the trial court upholding the lease termination, issuing a writ of restitution and entering judgment in favor of Housing Kitsap and against Kimbra convert Housing Kitsap's unilateral termination of Kimbra's lease and tenancy into bilateral or mutual termination. The termination remained entirely unilateral.

b. Like the Lease in *FPA v. Jamie Pendleton*, Kimbra's Lease Had No Fixed Termination Date.

Housing Kitsap also attempts to distinguish *Pendleton* by claiming that Kimbra's lease expired by its express terms on December 31, 2014 whereas Pendleton's lease did not expire until 2021. Contrary to Housing Kitsap's assertion, FPA did not "argue that the words "termination" and "expiration" were the same. *Brief of Respondent,* p. 18. Instead, FPA made the following argument:

> FPA contends that the unlawful detainer provision for holdover tenants, RCW 59.12.030(1), applies because Pendleton stayed in possession after FPA terminated the lease. FPA argues that because the lease allowed for termination for nonpayment of rent, and because FPA enforced that provision of the lease, the term of the lease had expired. Thus, FPA maintains that the statutory provision provides a basis to find Pendleton in unlawful detainer.

Pendleton, at 676. This is essentially the same argument made by Housing Kitsap here: "Because the lease here was terminated under federal law it did not renew. It expired on December 31, 2014. Housing Kitsap properly used RCW 59.12.030(1)." *Brief of Respondent,* p. 10. Housing Kitsap, like FPA, purports to have terminated the lease with a notice of lease termination permitted by a lease covenant but not provided for under state law. Housing Kitsap's argument, like FPA's, hinges upon its purported ability to terminate the lease prior to the date it would otherwise expire, then to assert that the term of the lease has expired.

The 90-month lease term in *Pendleton* was defined as "beginning

on the commencement date and ending on the expiration date, unless terminated sooner pursuant to the express terms and conditions of the lease." *Id.* at 669. The lease between Housing Kitsap and Kimbra, executed on January 10, 2014, provided that the "initial term of the Lease shall be 12 months. . . . Unless otherwise modified or terminated in accordance with Section VII, or unless not renewed for noncompliance with community service requirement, this Lease shall automatically be renewed for successive terms of 12 months." (Ex. 5, CP 326) As discussed in the *Brief of Appellant,* Page 23-26. Housing Kitsap's attempt to define the lease term as something other than a 12-month lease term that automatically renews is contrary to federal law.

Kimbra's tenancy is a periodic tenancy that renews automatically every twelve months. It is not a fixed term tenancy that expires at the end of specified term. Even under Housing Kitsap's theory, Kimbra's tenancy does not expire by itself without the assistance of a federal notice of termination of tenancy and grievance hearing decision upholding the termination. Like the landlord in *Pendleton*, Housing Kitsap asserts that the term of the lease expired once it terminated the lease. In both cases, however, there would be no lease expiration without the prior unilateral termination by the landlord. In both cases, the landlord failed to provide a statutory unlawful detainer notice with an opportunity to cure.

Under the Supreme Court holding in *Terry*, in an action for unlawful detainer alleging a breach of a covenant, a notice that does not give the alternative of performing the covenant or surrendering the premises does not comply with the statute, and without a proper unlawful detainer notice, the landlord cannot avail himself of the court's jurisdiction. Under the Court of Appeals holding in *Pendleton*, the fact that the lease provided a right to terminate without providing a notice with an opportunity to correct a breach does not allow the landlord to bypass giving a proper unlawful detainer notice with an opportunity to cure and proceeding under the holdover provision RCW 59.12.030(1).

III. CONCLUSION

The judgment of the trial court should be reversed. The trail court's Judgment should be vacated and the action dismissed. Kimbra should be restored to possession. 1C *Wash.Prac.* 88.43; RAP 12.8.

RESPECTFULLY SUBMITTED this 17th day of May, 2016.

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CERTIFICATE OF SERVICE

I, STEPHEN PARSONS, hereby certify under penalty of perjury under the laws of the State of Washington that on May 17, 2016 I served a copy of this Reply Brief of Appellant on David P. Horton by sending a copy by U.S mail, first-class postage prepaid addressed as follows:

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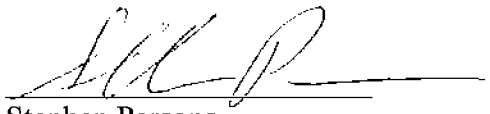

Stephen Parsons

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